In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 148 Misc.

JOHN E. DAY, JR., PETITIONER

v.

COLONEL JAMES W. DAVIS, COMMANDANT, U. S. DISCIPLINARY BARRACKS, FORT LEAVENWORTH, KANSAS, RESPONDENT

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Appeals (R. 71–89)[1] is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 21, 1956 (R. 90). A petition for rehearing was denied on July 9, 1956 (R. 91–93). The petition for a writ of certiorari was filed on July 20, 1956.

[1] "R." refers to the transcript of record. The court-martial and military appellate proceedings are contained in Exhibits A through H.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether in a court-martial trial for premeditated murder in which there was evidence of petitioner's drunkenness, the law officer's instructions were sufficient to present the issue of petitioner's possible guilt of the lesser included offense of unpremeditated murder.

2. Whether other alleged errors in the court-martial proceedings—including principally the contention that the victim's death was not proved as part of the corpus delicti—rendered the trial a mere sham, so that the conviction was vulnerable on habeas corpus.

STATUTES INVOLVED

Article of War 92, 41 Stat. 805, 806, as amended, 62 Stat. 640, in effect at the time of the crime, provided in pertinent part:

> MURDER-RAPE. Any person subject to military law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct; but if found guilty of murder not premeditated, he shall be punished as a court-martial may direct. * * *

Article 51 of the Uniform Code of Military Justice, 64 Stat. 124, 50 U. S. C. [1952 Ed.] 626, provides:

> *Voting and rulings.*
>
> * * * * *
>
> (c) Before a vote is taken on the findings, the law officer of a general court-martial * * * shall, in the presence of the accused and

counsel, instruct the court as to the elements of the offense and charge the court—

(1) that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt;

(2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt shall be resolved in favor of the accused and he shall be acquitted;

(3) that if there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and

(4) that the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the Government.

STATEMENT

Petitioner, an American soldier stationed in Korea, was tried on three charges (Ex. A. 69): (1) premeditated murder of Lee Hak Chun by shooting him with a carbine in violation of the then effective 92nd Article of War (*supra,* p. 2); (2) committing an assault with intent to do bodily harm upon Kim Chung Hi by striking her on the head with a carbine in violation of the 93rd Article of War; (3) committing an indecent assault upon Kim Chung Hi in violation of the 96th Article of War. The evidence may be summarized as follows:

On the night of December 22–23, 1950, Lee Hak Chun, his wife Kim Chung Hi, their children, and other Korean civilians were in the basement of the Eighth Army Officers' Building in the besieged city

of Seoul, awaiting transportation to Taegu. About midnight, petitioner sat down next to Kim, turned the lights off, later turned them on, and seized her by the throat. After being separated from Kim, petitioner struck her husband, Lee, on the chin and left (Ex. A, 73–75, 91–92). Petitioner, wearing only shorts and undershirt and carrying a carbine rifle, soon returned with an interpreter, who informed the Koreans that, unless Lee would send Kim upstairs with petitioner, he (petitioner) would kill them all. Petitioner directed Lee to step out from the line of Koreans which had been formed, and fired two shots point blank at Lee, killing him (Ex. A, 77, 93). Petitioner then took Kim outside the house, touched her body with his private parts, struck her head about five times with the carbine, and threw her baby on the seat of a truck (Ex. A, 78, 80, 86).

About 1:00 a. m. on December 23, Warrant Officer Foster, a Criminal Investigation Division agent, proceeded to the scene of the crime (Ex. A. 114). Foster found no pulse, no signs of respiration, and no body heat from the deceased's body. Foster had been an undertaker for four years, during which period he had occasion to examine many corpses. He noticed two bullet holes in the deceased's sweater on the left side of his chest, in the vicinity of his heart, and the "wounds of exit" in his back (Ex. A. 115–117). Foster identified Prosecution Ex. 2 (Ex. A. 149) as the photograph of deceased taken shortly after the shooting (Ex. A. 117). During Foster's investigation, three Koreans and the deceased's wife pointed to petitioner as the culprit (Ex. A. 120).

Petitioner was taken into custody about 4:00 a. m., and on the next evening, December 24, at about 6:00 p. m., he called Foster for the purpose of making a voluntary confession, which was introduced in evidence as Prosecution Ex. 3 (Ex. A. 121–126). In the confession (Ex. A. 151) petitioner admitted that he had shot the deceased and stated that he had been drinking.

On December 25 a Korean policeman named Lo Song Hyo inspected the deceased's body, ascertained, from the fact of its stiffness, that it was dead, and buried it. He also identified Prosecution Ex. 2 as a photograph of the deceased (Ex. A. 128).

In the prosecution's case, Corporal Lee testified rather vaguely about seeing petitioner and Kim when they were outside after the murder had been committed (Ex. A. 107–108). The prosecutor attempted to refresh the witness' memory by showing him a written statement he had signed the day after the shooting. The witness stated that the statement only slightly refreshed his memory, and the prosecutor offered the memorandum in evidence (Ex. A. 108, 110–111). Over defense objection the statement was received, after the witness had stated in answer to the the law officer's questioning that the statement accurately represented his knowledge of the incident at the time he made it (Ex. A. 111–112). In the statement (Prosecution Ex. 1), Corporal Lee recited that he had seen petitioner with "the baby in his arms and the [Korean] woman seemed to be pulling at him" (Ex. A. 147).

The defense offered testimony by two soldiers that petitioner had been drinking whiskey, saki, and wine throughout the day of the murder (Ex. A. 130, 132). There was also prosecution evidence that petitioner was drunk (Ex. A. 97, 126), although Corporal Lee testified that petitioner was not (Ex. A. 113). Petitioner, after being warned by the law officer of his rights, chose not to testify (Ex. A. 133).

In closing argument the prosecutor, in contending that the murder had been premeditated, read to the court these two definitions of premeditation from Black's Law Dictionary (Ex. A. 135):

> 1. To think of an act beforehand; to contrive and design; to plot or lay plans for the execution of a purpose.
>
> 2. The act of meditating in advance; the deliberation upon a contemplated act; plotting or contriving; a design formed to do something before it is done.

In defense counsel's closing argument, he urged that petitioner could not be guilty of premeditated murder since he was too drunk to have the necessary intent (Ex. A. 136–137). He read to the court the following excerpt from the Manual for Courts-Martial, 1949, paragraph 179a, p. 231 (Ex. A. 137):

> * * * A murder is not premeditated unless the thought of taking life was consciously conceived and the act or omission by which it was taken was intended. Premeditated murder is murder committed after the formation of a specific intention to kill someone and consideration of the act intended. Premeditation imports substantial, although brief, deliberation or de-

> sign. For example, if in the course of an attempt to rape, the assailant deliberately chokes his victim until she suffocates, the deliberate nature of his act reveals premeditation, even though he may have entered upon the attempt intending no other harm. But if, in attempting to run from her assailant, the victim falls from a cliff and is killed, premeditation is lacking * * *.

Defense counsel further read from Winthrop's Military Law and Precedents, Vol. I and II, 2d ed., at page 293 (Ex. A. 138):

> In military cases, the fact of the drunkenness of the accused as indicating his state of mind at the time of the alleged offence, whether it may be considered as properly affecting the issue to be tried or only the measure of punishment to be adjudged in the event of conviction, is in practice always admitted in evidence. And where a deliberate purpose or peculiar intent is necessary to constitute the offence, as in many cases of disobedience of orders in violation of Art. 21, desertion, mutiny, cowardice, or fraud in violation of Art. 60, the drunkenness, if clearly shown in evidence to have been such as to have incapacitated the party from entertaining such purpose or intent, will ordinarily properly be treated as constituting a legal defence to the specific act charged. * * *

Immediately thereafter, defense counsel read the following excerpt from Wharton's Criminal Law, Volume I, at page 101 (Ex. A. 138):

> * * * If the existence of a specific intention is essential to the commission of a crime, the

fact that an offender was drunk when he did such crime, should be taken into account by the jury in deciding whether he had that intention.

Thereafter the law officer instructed as follows (Ex. A. 139–141):

LO: The court is advised that the elements of the offenses charged are as follows: a. As to Charge I.

(1) That the accused unlawfully killed a certain person named by certain means, as alleged;

(2) That the victim is dead;

(3) That death resulted from an injury received by the victim;

(4) That such injury resulted from an act of the accused;

(5) That death occurred within a year and a day of such act;

(6) That such killing was with malice aforethought; and

(7) That the killing was premeditated.

The court is referred to paragraph 179a, pages 230–232, Manual of Courts-Martial, 1949, for a discussion of the offense of murder and the meaning of the terms "malice aforethought" and "premeditation." Among the lesser included offenses of premeditated murder are unpremeditated murder, voluntary and involuntary manslaughter, attempt to commit murder and certain forms of assault.

* * * * *

The court is further referred to paragraph 154, subparagraph (2), Manual for Courts-Martial, 1951, for a discussion of voluntary drunkenness as affects intent. I quote:

"A temporary loss of reason which accompanies and is a part of a drunken spree and which is not the result of delirium tremens or some other mental defect, disease, or derangement is not insanity in the legal sense. It is a general rule of law that voluntary drunkenness not amounting to legal insanity, whether caused by liquor or drugs, is not an excuse for crime committed while in that condition; but such drunkenness may be considered as affecting mental capacity to entertain a specific intent, or to premeditate a design to kill, when either matter is a necessary element of the offense.

"Evidence of drunkenness should be carefully scrutinized, as drunkenness is easily simulated or may have been resorted to for the purpose of stimulating the nerves to the point of committing the act."

The court is further advised:

First, that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt;

Second, that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt shall be resolved in favor of the accused and he shall be acquitted;

Third, that if there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and

Fourth, that the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the Government. The rule as to reasonable doubt extends to every element of the offenses charged.

No exception was taken to the charge and no request for further instructions was made by defense counsel.

Petitioner was found guilty under Charges I and II (premeditated murder and assault with a dangerous weapon with intent to do bodily harm) and not guilty under Charge III (indecent assault) (Ex. A. 142). A sentence of death was imposed (Ex. A. 144). After a complete review by the Staff Judge Advocate (Ex. B), the sentence was approved by the convening authority (Ex. A. 146). The Board of Review in the office of the Judge Advocate General affirmed (Ex. D; 8 CMR 424). The United States Court of Military Appeals also affirmed, with one judge dissenting, but reduced the assault charge to assault with a dangerous weapon (2 USCMA 416; 9 CMR 46; Ex. E).[2] President Eisenhower approved the death sentence and directed that it be carried into execution under order of the Secretary of the Army (Ex. H).

Subsequent to his return to the United States, petitioner filed, in the United States District Court for the District of Kansas, a petition for a writ of habeas corpus asserting numerous violations of his constitutional rights during the court-martial trial and the military appellate proceedings (R. 1–5).

The district court held a hearing at which petitioner testified that he did not have an opportunity to talk to defense counsel until about two days before the trial (R. 23–25). Petitioner testified that he asked

[2] In the appeals to both the Board of Review and the United States Court of Military Appeals, petitioner was represented by civilian and military counsel who filed briefs on his behalf (Ex. D, E).

his counsel without success for production of a Korean houseboy as a material witness. He stated that the witness would have testified that petitioner went downstairs only once before he fired the shots, and not twice (R. 25–27, 45–46). Petitioner testified further that he had been drinking heavily from 2:00 o'clock in the afternoon prior to the murder (R. 33–34).

The district court sustained respondent's motion to dismiss and ordered the writ of habeas corpus discharged (R. 14). On appeal from this order (R. 15), the Court of Appeals unanimously affirmed (R. 90). It is a review of this judgment of the Court of Appeals which petitioner now seeks.

ARGUMENT

The limited function of a civil court in a habeas corpus proceeding is to determine whether the military authorities have given fair consideration to the claims of the accused, not to reweigh the evidence tending to prove or disprove his allegations. *Burns* v. *Wilson*, 346 U. S. 137, 144. See, also, *Hiatt* v. *Brown*, 339 U. S. 103, 110–111; *In re Yamashita*, 327 U. S. 1, 8–9. Contentions urged by petitioner were given fair consideration within the framework of the military court system, and it is submitted that they were not properly cognizable on habeas corpus. Even if the issues were open, however, they present no basis for the relief sought.

1. Petitioner contends that the law officer's alleged failure to instruct the members of the court-martial on the lesser included offense of unpremeditated murder resulted in a withdrawal of that issue from the

court's consideration, so that he was deprived of a fair trial (Pet. 5–9). When the law officer's charge is read as a whole, as it must be (cf. *Boyd* v. *United States,* 271 U. S. 104, 107), and the attendant circumstances are taken into account, this contention is untenable.

In closing argument, defense counsel took the position that petitioner could be found guilty only of the lesser included offense of unpremeditated murder, since his drunkenness prevented the requisite intent for premeditated murder, while the prosecutor argued to the contrary. Both counsel read to the court-martial passages from authoritative texts showing the requirements for premeditated murder, and how an accused's drunkenness might be taken into account in deciding whether he had the necessary criminal intent (*supra,* pp. 6–8).

The law officer in his instructions then listed malice aforethought and premeditation as elements of the murder offense under Charge I; referred the court to paragraph 179a, Manual for Courts-Martial 1949 (from which defense counsel had previously read to the court) for a discussion of these terms; and expressly stated, "Among the lesser included offenses of premeditated murder are unpremeditated murder * * *" (Ex. A, 139–140). Shortly thereafter, the law officer referred the court to, and read from, paragraph 154a (2), Manual for Courts-Martial 1951, explaining that while voluntary drunkenness is not an excuse for committing a crime, it "may be considered as affecting mental capacity to entertain a specific intent, or to premeditate a design to kill, when either matter is a

necessary element of the offense" (Ex. A. 140). The law officer then gave instructions on reasonable doubt and stated, "that if there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt * * *" (Ex. A. 141). His charge was in accordance with Article 51 (c) of the Uniform Code of Military Justice (*supra,* p. 2) and Manual for Courts-Martial 1951, par. 73 (a), implementing it.

The law officer announced that both the 1949 and 1951 Manuals for Court-Martial, to which reference had been made, were available for the court's study (Ex. A. 142). Defense counsel did not request further instructions.

In this total setting, it is submitted that the court was adequately instructed that it should find petitioner guilty of only the lesser included offense of unpremeditated murder, if it thought that drunkenness negatived existence of the requisite intent. The evidence was clearly sufficient to support the court's contrary finding of premeditated murder. See 8 CMR 424, 430–431.

2. Petitioner raises other isolated contentions of error in the court-martial proceedings and asserts that, in their totality, they rendered the trial a mere sham or pretense, so that the conviction was vulnerable on habeas corpus (Pet. 9–18). These points are without substance.

a. Petitioner argues at some length that there was insufficient proof of the victim's death as part of the corpus delicti. This contention is apparently based upon the erroneous premise that, under the circum-

stances, it was necessary for a medical authority to testify as to the death (Pet. 11–13, 14–18).

It is, however, well established that the elements constituting the corpus delicti in a homicide case may be sufficiently proved by presumptive or circumstantial evidence. *Sanford* v. *United States*, 98 F. 2d 325, 326, 328 (C. A. D. C.); *United States* v. *Brown*, Fed. Cas. No. 14,656a (S. D. N. Y.). If the cause of death is not obscure and is within the range of an average layman's perception, it is not necessary to resort to expert medical testimony as to this part of the corpus delicti. See cases collected in 31 A. L. R. 2d 693, 697–701.

Warrant Officer Foster was even more qualified than an ordinary layman, by reason of his previous experience as an undertaker, to testify that the victim was dead. His testimony and that of the Korean policeman (*supra*, pp. 4, 5) constituted sufficient evidence of the death.

b. Petitioner contends that his court-martial trial was improper, since it lasted only about six hours and the court-martial did not deliberate long enough on the verdict (Pet. 10–11, 14). The contention is without merit.

The trial began on October 1, 1951, at 10:00 a. m. (Ex. A. 65). The court was closed at 4:04 p. m. to deliberate on its verdict, and returned with its decision at 4:19 p. m. (Ex. A. 142). The facts were not at all complicated, and there was no reason for the trial to last longer than it did.

c. Petitioner urges that he was improperly prevented from having a Korean houseboy produced as

a witness, and that this person was the only eye witness (Pet. 11). That, however, was not true since the deceased's wife and Woo Chung Yul both testified as eye witnesses to the murder (Ex. A. 77, 93).

At the court-martial, petitioner's counsel did not request the production of this witness or even give his name; nor did he file the required written statement showing what the expected testimony would be or why his appearance was necessary. See Manual for Courts-Martial, 1951, par. 115 (a), pp. 188–189. At the habeas corpus hearing, petitioner again did not name the witness, but did state that the witness would have testified that petitioner went downstairs only once before he fired the shots, and not twice, as shown by the evidence (R. 25–27, 45–46). Even assuming such testimony had been given, it could hardly be said to have been sufficient to negative the premeditated murder.

d. Contrary to petitioner's contention (Pet. 10, 13), the interval of approximately ten months between the commission of the offense and the court-martial trial manifestly did not constitute unreasonable delay under the circumstances. Seoul was being evacuated by both the army and civilians (R. 32), and the army investigators experienced difficulty in securing witnesses (Ex. A. 30, 52; Ex. G. 172). The right to a speedy trial must be determined in the light of all the circumstances in each case. *Beavers* v. *Haubert*, 198 U. S. 77, 87.

e. Petitioner assigns as error (Pet. 13–14) the introduction of Corporal Lee's statement, which he had signed shortly after the offense (*supra*, p. 5). Corporal Lee, having no clear recollection of all the

material facts, testified that the statement accurately represented his knowledge of the incident at the time he made it, and it was thus admissible under Manual for Courts-Martial, 1951, par. 146 (a).[3] 8 CMR at 431–432; 9 CMR at 55–56. Moreover, as the court below held, "* * * it was merely cumulative evidence and if it was improperly admitted, at most it was error, and did not amount to the deprivation of any constitutional right guaranteed to [petitioner]" (R. 88).

f. The record negates petitioner's contention that he did not have an opportunity to confer with counsel for preparation of his defense until two or three days prior to the actual trial (Pet. 14).

Charges, of which petitioner was informed, were prepared on May 13, 1951, but were withdrawn because of certain deficiencies on August 13, 1951 (Ex. A. 47, 56; R. 43). The charges upon which petitioner was tried were prepared on August 23 and investigated on August 31, at which time military counsel was made available to him (Ex. A. 23, 24, 28). The charges

[3] Par. 146 (a) reads as follows in pertinent part:

"Memoranda may be used to supply facts once known but now forgotten, or to refresh the memory. Memoranda are therefore of two sorts. *First*, if the witness does not actually remember the facts or events but relies on the memorandum exclusively, as in the case of a witness using an old diary, then the witness must be able to state that the memorandum accurately represented his knowledge at the time of its making. It is not necessary that he should himself have made the memorandum if he can state from his present memory that at a time when his recollection was fresh as to the facts or events recorded he read the memorandum and found it to be correct, or must have done so. * * *

"A memorandum of the first sort is admissible. * * *"

were referred for trial on September 22, 1951, when petitioner was placed in confinement (Ex. A. 64; R. 42–43). On the following day the charges were served upon petitioner (Ex. A. 71), and the trial was held on October 1, 1951 (Ex. A. 65).

Defense counsel Abbott stated that he began preparation of petitioner's defense about September 9, even though the official order appointing him was not made until September 22, and that from September 9 to the date of trial on October 1 the "greatest majority of [his] time during these seven-day weeks was spent" in defending petitioner (Ex. G. 161). The other defense counsel, Williams, stated that he recalled "talking with [petitioner] on probably three occasions from one and one-half hours to one full half day," and that he and defense counsel Abbott "thoroughly discussed [with petitioner] the killing itself and the testimony of witnesses" (Ex. G. 173).

In its details, as well as its totality, petitioner's trial was eminently fair.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

AUGUST 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956